DAVID A. ROSENFELD, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net

Attorneys for Charging Party, ROBERT MUNOZ

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

TARLTON AND SON, INC., Employer/Respondent, and ROBERT MUNOZ, An Individual/Charging Party	Nos. 32-CA-119054; 32-CA-126896 **CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

I. INTRODUCTION

Although the Charging Party generally agrees with the conclusion of the Administrative Law Judge ("ALJ"), there are a number of issues that she completely ignored. These are issues that we will address in these Exceptions. They are important to the Board's treatment of forced arbitration provisions.[1]

We object to the use of the employer's inappropriate term "Mutual Arbitration Policy." More correctly it is a "Forced Unilateral Arbitration Policy." We refer to it as the "FUAP."

The ALJ ignored many important issues raised in our Brief. We address those issues below which the Board must confront.

II. FACTUAL FINDINGS THAT NEED TO BE CORRECTED

There are several factual findings that need to be corrected and are addressed in these Exceptions:

1. The ALJ failed to make a specific finding that there is at least one truck driver involved in transportation.

2. The ALJ suggested at one point that "tapers or drywall finishers are represented" when the record is to the contrary, and she expressly declined in a footnote to make any specific findings regarding representation.

3. The ALJ erroneously referred to the "California Labor Codes" when there is only one California Labor Code.

4. The ALJ suggested that the Respondent received a copy of the class action complaint "between November 7 and November 19" when, in actuality, the Employer received it closer to November 7.

5. The ALJ suggested that the proposed FUAP was received by Tarlton on November 19, the same day that Tarlton allegedly forwarded it to the Carpenter representative.

[1] For a good discussion of the issues, see the Symposium Issue of the Berkeley Journal of Employment and Labor Law, *Forced Arbitration in the Workplace*, 35 Berkeley J. Emp. & Lab. L. 1 (2014). See Catherine Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D. R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175 (2014).

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

6. The ALJ failed to find that the release settlement agreements signed by many of the workers were part of the implementation of the FUAP and therefore must be rescinded.

7. Throughout the opinion, the ALJ failed to note that the FUAP prohibits representative actions. These are recognized under the Private Attorney General Act in California, Labor Code § 2699. They are distinct from other forms of collective actions.

These factual errors should be corrected.

III. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER WORKERS.

The ALJ did not address directly the question of whether the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq*., may not trump the application of the National Labor Relations Act as to other federal statutes that allow whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), there are important purposes underpinning Section 7 that are not addressed by the Federal Arbitration Act. That equally applies to claims that employees can make under other federal statutes regarding workplace issues.[2] Here, we point out that the FUAP provision effectively undermines those other federal statutes. Thus, the restriction found in the FUAP, that any remedy is "individual" only, would interfere with other federal statutory schemes, which envision and, in some cases, require remedies that will affect a group. The Board has been admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), that it must respect other federal enactments. Here, the Board should recognize that there are many federal statutes that allow group, collective or class claims or even individual claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

[2] We emphasize that what is not at issue is the individual right of employees to file claims of any kind with federal agencies or in federal court. Where the action is not concerted and not for mutual aid or protection, the NLRA is not implicated. It is only when the action is concerted and for mutual aid or protection that the NLRA Section 7 protection is triggered. This discussion assumes that an employee may invoke these other federal laws to benefit herself and other employees.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Employees have the right to bring to various federal agencies all kinds of issues that affect them and other workers. Under these statutes, they have the right to seek relief from those agencies for their own benefit as well as for the benefit of other workers or employees of the employer. Those remedies can involve government investigations, injunctive relief, and federal court actions by those agencies, and debarment from federal contracts, workplace monitoring and many other remedies that would be collective and concerted in nature.

In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well as on behalf of other employees, protections of these various federal statutes. It would prohibit the agency or the court from remedying violations of the law that the agency or court would be empowered, if not required, to remedy.

The Congressional Research Service has identified 40 different federal laws that contain anti-retaliation and whistleblower protection. (See Jon O. Shimabukuro et al., Cong. Research Serv., R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (2013), available at http://fas.org/sgp/crs/misc/R43045.pdf.) These are all laws that relate directly to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other federal laws. Some examples are mentioned below.

The federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., allows for the District Courts to grant injunctive relief to "restrain violations of [the Act]." (See 29 U.S.C. § 217.) The application of the FUAP would prevent an individual or a group of individuals from seeking injunctive relief that would apply to all employees or apply in the future to themselves and other employees. It would undermine the purposes behind the FLSA to allow for such injunctive relief.

The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq*. The FUAP would prohibit an employee from going to court with respect to a claim involving a benefit covered by ERISA, even though the statute expressly allows for equitable relief. (29 U.S.C. § 1132(a)(1) and (3).)

The FUAP would prevent employees from bringing a complaint to OSHA seeking investigation and correction of worksite problems affecting all employees.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The FUAP would prevent an employee from filing an EEOC charge that could lead to EEOC action seeking systemic or class wide relief.

The FUAP would prevent employees from bringing unlawful immigration practices to the attention of the Office of Special Counsel. (http://www.justice.gov/crt/about/osc/.)

The FUAP would prohibit actions under the federal False Claims Act. (http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.) An employee could not, for example, claim that on a federal Davis-Bacon project, the employer made false claims for payment while not paying the prevailing wage. (See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012).) This kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This kind of claim is necessarily brought as a group action, since the relief sought includes a remedy for the underpayment of a group of workers.

The FUAP would prohibit an employee from bringing a claim to the Department of Labor that Tarlton violates the provisions of the Fair Labor Standards Act regarding employment of minors unless the individual were herself an under-aged minor.

The FUAP, by its terms, undermines the enforcement of these federal statutes, which envision private efforts to enforce their purposes for all employees and for the public interest.

There is no escaping the conclusion that there are a multitude of federal laws that govern the workplace. The FUAP prohibits an employee acting collectively or to benefit others[3] from seeking assistance before those agencies and in court to effectuate the purpose of those statutes. The FUAP would prohibit the employee from doing so for the benefit of employees acting collectively. The purposes of those statutes would include not only individual relief for the employee himself or herself, but also relief that would protect the public interest in enforcement of those statutes.

[3] The FUAP would prevent an employee from seeking assistance of others to proceed collectively. An employee could be disciplined for seeking to invoke a collective action on the theory that this would violate the company policy contained in the FUAP.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

For these reasons, the FUAP itself is invalid, not only because it would prohibit an employee from seeking concerted relief with respect to other federal statutes, but also because it would prohibit the employee from seeking relief that would benefit other employees. The FAA cannot serve to interfere with the enforcement of other federal statutes. The Board should grant this exception and expressly rule that the application of the FAA interferes with important policies under other federal statutes.

IV. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT PREEMPTED BY FAA UNDER STATE LAW.

The ALJ totally ignored this issue. This issue is dependent on the fact that FUAP applies in California. The California Supreme Court has recognized recently that an arbitration agreement cannot foreclose application of the Private Attorney General Act, Labor Code § 2699 and 2699.3. (See *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348 (2014), *cert. den*. ___ U.S. _(2014))

There are numerous other provisions in the Labor Code that permit concerted action. (See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S. Ct. 2724 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor Commissioner, although state law is also preempted from categorically allowing all claims to proceed before the Labor Commissioner in the face of an arbitration policy).)

The FUAP would interfere with the substantive right of the California Labor Commissioner to enforce the wage provisions of the Labor Code. (See, e.g., Labor Code § 217.)

There are, additionally, various provisions in the Labor Code that allow only the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP would prevent employees from collectively going to the Labor Commissioner seeking these penalties for themselves or other employees. It would foreclose an employee from asking the Labor Commissioner to seek remedies for a group of employees. (See, e.g., Labor Code § 210(b) (allowing only the Labor Commissioner to impose specified penalties); Labor Code § 218 (authority of district attorney to bring action); Labor Code § 225.5(b) (penalty recovered by Labor Commissioner). IWC Order 16, Section 18(A)(3), available at

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

https://www.dir.ca.gov/iwc/IWCArticle16.pdf.) Employees could not collectively seek enforcement of these remedies because the FUAP prohibits them from bringing claims collectively to that agency.[4]

The recently enacted sick pay law is only enforceable by the Labor Commissioner. (See Labor Code § 245 (effective July 1, 2015).) The FUAP would foreclose enforcement of this new law. Individuals or groups of individuals do not have the right to enforce the law in court or before an arbitrator. For purposes of this case, it would foreclose concerted enforcement of the new law since the arbitration process would not be authorized to enforce a law given exclusively to the Labor Commissioner.

Additionally, under state law, there are a number of whistleblower statutes just as there are under federal law. The FUAP would prohibit employees from invoking those statutes for relief that would affect them as well as the others. The Labor Commissioner lists thirty-three separate statutes that contain anti-retaliation procedures. (See http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf.)

California has strong statutory protection for whistleblowers. (Labor Code § 1101 and 1102.) The FUAP defeats the purposes of those statutes that allow groups to bring claims forward to vindicate the public purpose animating those provisions.

Just as the California Supreme Court held in *Iskanian*, there are important public purposes animating these statutes that allow employees to seek assistance from either state agencies or the court system. To prevent employees from seeking relief for other employees in the workplace would be to effectively deprive them of substantive rights guaranteed by state law. The FAA does not preempt such state laws. (See *Iskanian*, *supra*.)

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[4] Again, we note that what is not before the Board is the right of an individual to bring his/her claim without concerted activity to the state agency. The issue is the right of employees to bring the claim collectively for mutual aid or protection.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The Board must address the question of the application of *Iskanian* and similar doctrines. The FUAP is invalid because it prohibits the exercise of this important state law right, which serves an important public purpose.

V. THE FAA DOES NOT APPLY TO THE TRUCK DRIVER.

The ALJ failed to even mention the truck driver issue, which was addressed in Charging Party's brief.

Tarlton, as a construction industry employer, is engaged in interstate commerce for purposes of the NLRA. It purchases product from out of state for most of its projects, although most of its projects are in the state. (Tr. 202 and 136.) Tarlton employs at least one truck driver. (Tr. 57.) The Federal Arbitration Act plainly exempts from its application drivers who are involved in interstate commerce, meaning interstate transportation of goods. (See 9 U.S.C. § 1; see also *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (discussing transportation exemption).) One Court has extensively discussed this issue and stated:

> Thus, reviewing the case law, this Court can see a general trend amongst the circuits. Plaintiffs who are personally responsible for transporting goods, no matter what industry they are in, are "transportation workers" under the FAA exemption. Plaintiffs who oversee the transportation of goods in the transportation industry itself are also "transportation workers" under the FAA exemption.

(*Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *6 (N.D. Cal. Apr. 5, 2004) *modified on reconsideration*, No. 03-01180 (SBA), 2005 WL 1048699 (N.D. Cal. May 4, 2005).)

Although Tarlton is not involved in the transportation industry, the truck driver who hauls construction material, some of which is purchased from out of state, is a transportation worker and thus within the exclusion.

Even to the extent the FAA may foreclose the National Labor Relations Act from protecting Section 7 rights for other employees, it cannot do so for the truck driver. The Board must address that issue in this case.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

VI. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT OF EMPLOYMENT; THE FUAP CANNOT BE APPLIED RETROACTIVELY.

The FAA applies only where there is "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." (9 U.S.C. § 2.) The FUAP states, "Therefore, the Company has adopted and implemented this FUAP ("FUAP") as a mandatory condition of employment." Under the FAA there must be some other "contract involving commerce." There is no other contract established on this record or found by the ALJ.[5]

[5] The Supreme Court's seminal decision applying the FAA is expressly conditioned upon the existence of an employment contract:

> Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all, since the word "transaction" in § 2 extends only to commercial contracts. See *Craft,* 177 F.3d, at 1085 (concluding that § 2 covers only "commercial deal[s] or merchant's sale [s]"). This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous. If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... interstate commerce" would be pointless. See, *e.g., Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). The proffered interpretation of "evidencing a transaction involving commerce," furthermore, would be inconsistent with *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where we held that § 2 required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." Nor could respondent's construction of § 2 be reconciled with the expansive reading of those words adopted in *Allied–Bruce,* 513 U.S., at 277, 279–280, 115 S.Ct. 834. If, then, *114 there is an argument to be made that arbitration agreements in employment contracts are not covered by the Act, it must be premised on the language of the § 1 exclusion provision itself.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113-14(2001); See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from the remainder of the contract).

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There is no contract. The FUAP was a unilaterally implemented company policy. Although employees signed it, there is no other contract of employment which would trigger the application of the FAA.[6]

Moreover, the FUAP cannot be applied retroactively. Assuming that the FUAP is considered a contract subject to the FAA, it cannot be applied retroactively to create a retroactive contract. On additional grounds, the FUAP is invalid notwithstanding the application of the FAA.

Because there is no contract of employment under California law, the FAA cannot apply.

VII. THE FUAP IS VOID UNDER STATE LAW BECAUSE IT IS RETROACTIVE.

The ALJ failed to address the issue that FUAP is retroactive and therefore attempts to void vested rights. The FUAP is void since it is retroactive and would apply to the vested rights that employees would have to bring claims that had arisen before the implementation of the policy to court or to any agency. (See *Asmus v. Pac. Bell*, 23 Cal.4th 1, 16 (2000) (employer may not interfere with vested benefits).) The FUAP applies to all "disputes [that] already exist today or in the future."

As noted above, moreover, the FUAP a retroactive agreement cannot be subject to FAA application or preemption.[7]

VIII. THE RETROACTIVITY OF THE FUAP VIOLATES SECION 7; THE PROSPECTIVE APPLICATION AFTER AN EMPLOYEE LEAVES VIOLATES SECTION 7.

Because the FUAP is retroactive and applies "whether those disputes already exist," it would cut off collective action that had been available and contemplated as to any dispute before its implementation. It would also deprive employees of the right to refrain to the extent they

[6] There appears to have been a time gap between when it was implemented all employees signed it.

[7] Although the statute of limitations for bringing an unfair labor practice charge is 6 months, many claims that existed before the FUAP was implemented had as much as a 4 year statute of limitations under California or Federal law.

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refrained from collective action beforehand waiting for the opportunity to engage in concerted activity to raise such disputes.

The FUAP purports to govern even after an employee quits or is fired. If the employee chooses to quit because of miserable working conditions or to organize, he is barred from acting collectively. Tarlton cannot bar an employee who has terminated any employment agreement from acting collectively.

IX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT.

The ALJ failed to address the specific issue that the Norris-LaGuardia Act makes the FUAP unlawful. The Norris–LaGuardia Act, 29 U.S.C. § 101 *et seq.*, states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of ... representatives [of their own choosing] or in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 102 (emphasis added).) The Act declares that any "undertaking or promise in conflict with the public policy declared in section 102 ... shall not be enforceable in any court of the United States." (29 U.S.C. § 103.) The FUAP plainly interferes with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed by the Norris-LaGuardia Act.

X. ARBITRATION, AS AN ACTIVITY, DOES NOT AFFECT INTERSTATE COMMERCE, AND THE APPLICATION OF THE FEDERAL ARBITRATION ACT IS UNCONSTITUTIONAL TO THAT ACTIVITY.

Although the Charging Party made a big point of this in his brief, the ALJ totally ignored this argument. The FUAP affects only the activity of dispute resolution and affects only a narrow portion of the dispute resolution process. It does not govern, for example, an open door policy or any other workplace policies. It governs only final adjudication of those policies and governs only arbitration.

In the case of the FAA, federal jurisdiction is allegedly provided by the interstate commerce business of the employer and thus is constitutionally permissible under the Commerce Clause. There plainly is commerce jurisdiction as to the construction business. There is no

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Alameda, California 94501
(510) 337-1001

commerce jurisdiction of employment dispute resolution. Because the FAA is based on Commerce Clause jurisprudence, there is now a substantial question about whether the FAA, as applied to the circumstances of this case, is constitutional. The Supreme Court's recent decision in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), substantially changes the analysis.

The FUAP affects only the activity of dispute resolution and affects only a narrow portion of the dispute resolution process. It does not govern, for example, an open door policy or any other workplace policies. It governs only final adjudication of those policies and governs only arbitration.

In *Sebelius*, the Supreme Court considered the authority of Congress to enact the so-called individual mandate, which requires citizens to purchase and maintain healthcare insurance. The individual mandate was an essential part of healthcare reform. The majority of the Court defined the activity at issue as the purchase of healthcare insurance. The majority opinion, authored by Chief Justice Roberts, found that there was no commercial activity subject to regulation under the Commerce Clause; instead, it was a matter of non-activity, i.e., individuals choosing not to purchase insurance. The *Sebelius* court found that Congress could not regulate this non-activity, i.e., the failure to purchase health insurance, under the Commerce Clause because there was no pre-existing economic activity. (*Sebelius*, 132 S. Ct. at 2590-91.)

The same analysis is equally applicable here. Although the activity of Tarlton itself may affect commerce—which the Charging Party does not dispute—the manner of resolution of a dispute between Tarlton and its employees—whether in court or in arbitration—does not have any impact on any issue of commerce. Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything more than state laws, do not come under the broad umbrella of the Commerce Clause.[8] The Commerce Clause can only regulate classes of activities; it may not be used to

[8] No federal claims are asserted in the Munoz litigation.

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regulate "classes of individuals, apart from any activity in which they are engaged." (*Sebelius*, 132 S. Ct. at 2591.) Because the application of the FAA depends on the Commerce Clause, and because there is no substantial effect on interstate commerce by the forum in which this employment dispute is resolved, the FAA cannot be used to prohibit or interfere with protected concerted activity under the National Labor Relations Act.

The Board may not find that the activity to be focused on is the interstate commerce aspect of the construction business. We agree, of course, that as a construction company it is engaged in interstate commerce. Indeed, the Fair Labor Standards Act, Title VII of the Civil Rights Act and much other federal legislation apply to this employer because those Acts regulate the commercial aspect of the business. The activity at issue here is not health and safety (OSHA), wages (Fair Labor Standards Act) or any other aspect of the regulation of commerce by the federal government.

The Federal Arbitration Act does not purport to regulate anything except the narrow aspect of dispute resolution. Even if the Employer's business did not affect interstate commerce (such as being two employees), if there was an arbitration agreement, it would be governed by the Federal Arbitration Act because the activity of dispute resolution is subject to Commerce Clause regulation.

The courts have attempted to address this issue. The courts in *Stampolis v. Provident Auto Leasing Co.*, 586 F.Supp.2d 88 (E.D.N.Y. 2008), and *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is different from the activity of the entity involved in the litigation. (See also *Rodriguez v. Testa*, 296 Conn. 1, 26, 993 A.2d 955, 969 (2010) (finding statute constitutional under commerce clause because it regulates industry, not litigation).)

That is the critical distinction that the Board must face.

We recognize that the NLRA extends to this Employer. So does the Fair Labor Standards Act, the Occupational Safety and Health Act and many other examples of federal regulation. But that is because each of those statutes regulates a broad or a narrow scope of activity affecting commerce. The FAA does not regulate the same kind of commercial activity.

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In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the Gun Free School Zones Act, which prohibited individuals from possessing firearms in school zones. It did so because it found that the possession of guns was not an economic activity. This is a narrow and important reading of what activity is to be analyzed for purposes of determining Commerce Clause authority. (See also *Gonzales v. Raich*, 545 U.S. 1 (2005).)

The fundamental problem is that the Federal Arbitration Act does not regulate the construction industry or any commercial activity. It simply regulates dispute resolution. That activity itself does not affect interstate commerce.

The result here is anomalous. It means that a small employer, whose business does not affect commerce, will nonetheless be governed by the FAA if it imposes or uses arbitration. It means that a claim by one worker for a small wage claim based on a contract with an employer who claims it has no impact on commerce will be subject to regulation by the FAA.

In summary, the Board may regulate the business of this construction industry employer because of the impact on commerce. No one disputes that. The Federal Arbitration Act, however, is not authorized to focus upon the specific activity of dispute resolution in the form of arbitration because that activity does not affect commerce within the Commerce Clause.

XI. THE RECORD DOES NOT ESTABLISH THAT ALL DISPUTES SUBJECT TO THE FUAP WOULD BE "ENGAGED IN COMMERCE." AS A RESULT, THE FAA WOULD NOT APPLY TO ALL DISPUTES, AND COMMERCE CLAUSE JURISDICTION HAS NOT BEEN ESTABLISHED.

The FAA applies only to "commerce among the several states." (9 U.S.C. § 1.) It further applies only to "a contract evidencing a transaction involving commerce.." The Supreme Court in *Circuit City Stores, Inc. v Adams*, 532 U.S. 105 (2001), held that Congress did not intend an expansive meaning of "commerce" to extend to the full limits of the Commerce Clause. Here, the FUAP would extend to any employment dispute. It could encompass a claim for one hour's pay, one missed meal period or rest break[9] or any other claim that has no impact whatsoever on commerce. We concede that some claims might affect commerce, but not all claims will. But the

[9] California Labor Code 227.3.

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burden is on Respondent to prove its defense that the FAA governs. It must establish that every claim encompassed by the FUAP would somehow affect "commerce" within the meaning of the FAA.

Further, Respondent would have to show that such a claim would affect commerce so as to trigger the Commerce Clause.

Respondent will argue that there is a contract of employment that affects "commerce" within the meaning of the FAA and thus the Commerce Clause. First, as shown above, there is no employment contact. At best, there is a contract as proved only in the FUAP. Tarlton provided no evidence of any employment contract (other than the collective bargaining agreements) and thus has failed to establish the existence of any such agreement that would apply.

XII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A REPRESENTATIVE OF AN EMPLOYEE OR BY THE LABOR ORGANIZATION THAT CURRENTLY REPRESENTS SOME OF THE EMPLOYEES.

The ALJ did not address this argument raised by the Charging Party.

The FUAP prohibits a union that represents an unrepresented employee from representing that employee in the arbitration procedure. That is, it would prohibit a union from acting on behalf of an employee, not as the collective representative of the group, but rather as the representative of the individual employee. It would also prevent a union from acting as the minority representative or members-only representative of an employee or group of employees. Such activity is protected. It would prevent a union from acting on behalf of a group of employees.

It would prevent a federally recognized Joint Labor Management Committee from doing so. (See 29 U.S.C. § 175a.)

Additionally, here, there is a bargaining representative, the Carpenters Union, covering many of the employees. This FUAP affects the right of the Carpenters Union and other unions which may represent the employees from representing them on a concerted basis. This undermines the very concept of exclusive representation of the entire bargaining unit to insist that

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the Union can only represent one employee at a time. (See *NLRB v. J. R. Weingarten*, 420 U.S. 251 (1975). Cf. *I.B.M. Corp*., 341 NLRB 1288 (2004). See ROBERT A. GORMAN & MATTHEW FINKIN, LABOR LAW ANALYSIS AND ADVOCACY, Chap. 16.4 (Juris Publishing, Inc. 2013).) This undermines the exclusivity principle.[10]

XIII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE OF ANOTHER EMPLOYER FROM ASSISTING A TARLTON EMPLOYEE OR JOINING WITH A TARLTON EMPLOYEE TO BRING A CLAIM.

Separately, an employee of any other employer is also an employee within the meaning of the Act. (Eastex v. NLRB, 437 U.S. 556 (1978).) Such other employee could assist an employee of Tarlton or join with a claim brought by a Tarlton employee. The rights of all other employees of other employers are violated by the FUAP independently of whether it violates just the Section 7 rights of Tarlton employees

XIV. BECAUSE THE EMPLOYER ALLOWS GROUP CLAIMS TO BE BROUGHT, IT HAS NO VALID BUSINESS JUSTIFICATION TO PRECLUDE THEM IN ARBITRATION.

The ALJ failed to address the argument hat no business justification was established on the record for the FUAP.

The record establishes that the Employer allows employees to bring group claims or concerns concertedly to management's attention. (Tr. 106-017; 112.) Thus, the Employer allows group claims but forecloses them only when the dispute gets to arbitration. Any legitimate purpose in limiting group, collective or class claims is undermined if the employer allows groups to bring claims concertedly to management's attention.

Even if the FAA did apply and the federal cases that limit the ability of a party to invoke a class-wide arbitration when the arbitration agreement does not explicitly call for group resolution were relevant,[11] the Employer here has negated the limitation by its own actions. Tarlton has an open door policy under which it accepts and resolves group complaints. "It is equally well settled

[10] If a union were to win a representation election, this provision would prohibit the recognized union from representing employees collectively under the FUAP. Thus, it is unlawful since it discourages organizing.

[11] *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

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that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure." (*D. R. Horton*, 357 NLRB No. 184, p. 3 (2012), quoting *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028, 1033 (1976).) There is no justified rationale allowing for group complaints at every stage of dispute resolution other than the final step of arbitration. Further, Tarlton's FUAP indicates that nothing in the FUAP governs charges before the NLRB.

Applying the tests of either *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963), or *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), this conduct is destructive of Section 7 rights because it limits Section 7 activity on its face without a business justification.[12] Here, moreover, it discourages union activity where the employees have selected a union as their representative but are precluded from engaging the union to pursue group claims on their behalf.

XV. THE FUAP IS INVALID BECAUSE IT IMPOSES ADDITIONAL AND PUNITIVE EXPENSES ON WORKERS, INCLUDING THE ARBITRATION COSTS, WHICH COSTS ARE NOT IMPOSED IN MANY OTHER FORA AVAILABLE TO WORKERS.

The ALJ did not address this issue.

The FUAP is unlawful under state and federal law. The FUAP contains another serious impediment to single or even any group action. Arbitration is exceedingly expensive. Workers can jointly file, without charge, a claim with the California Labor Commissioner and other agencies without a filing fee or other costs. This is true of most administrative agencies. The FUAP imposes arbitration fees and costs up to "your local court civil filing fees." The fee is

[12] Tarlton has provided no record evidence of the business purpose for requiring waiver of concerted activity. Whether it has any business purpose of requiring arbitration is not the issue. The question is whether it has a sufficient business purpose to prohibit class or collective actions other than to prevent litigation of such issues. It has provided no basis to do so and cannot meet its burden.

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$435.[13] The FUAP requires each individual to pay the fee up to $435. If the workers could combine their cases, they could share that fee. Thus, prohibiting employees from joining cases imposes a monetary penalty and is coercive and violates Section 8(a)(1).[14]

The FUAP imposes a penalty on employees who would bring group claims (and, again, not necessarily class claims) because each employee would have to bear the cost of the individual arbitration rather than share the cost among a group of employees who choose to act concertedly.[15] The FUAP requires employees to pay to exercise their Section 7 rights where, by group action, they could reduce their costs or eliminate them entirely. There is no reported Board case yet that allows an employer to put an economic price or penalty on the exercise of Section 7 rights.

Because the FUAP imposes a cost of at least $435 on each individual worker, it is unlawful because many agencies allow claims without a fee. This imposes a substantial penalty on workers who are thus foreclosed from remedying their workplace issues. It imposes a monetary penalty because each individual worker has to pay at $435 to bring his or her claim when, if they could do it collectively, they could share the filing fee costs.[16] They could also share the cost of legal or other representation.

Moreover, the provision prohibits effective vindication of wage and hour claims. The Board noted that class and collective actions allow employees to pool their claims and resources for the greater collective good. (*Murphy Oil, supra.* See also *Phillips Petroleum v. Shutts*, 472

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[13] http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide%20Civil%20Fee%20Schedule%20January%202014.pdf. The initial fee is not the only fee that is imposed. There are subsequent fees for motions and other matters. There is an additional fee for courthouse construction, which can be over $200. (See *id.*) Thus, a worker could pay substantially more than $435 for a wage claim.

[14] If four workers joined together, it would cost each of them a little over $100 to file in Court. This illustrates that the FUAP makes it more expensive to bring claims and is facially invalid under Section 8(a)(1).

[15] It also makes hiring a lawyer prohibitively expensive since workers could not effectively share the cost in separate proceedings.

[16] They could also share litigation expenses such as discovery costs of depositions, expert witnesses and so on.

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U.S. 797, 809 (1985).) "[T]he class action is the only economically rational alternative when a large group of individuals ... has suffered an alleged wrong but the damages due to any single individual ... are too small to justify bringing an individual action." (*In re Am. Express Merchs. Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).) The potential recovery in an individual wage case, particularly one involving low-paid workers, may be so small that no rational person would be willing or able to pursue it unless as part of a larger class or collective action. (See, e.g., *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002).) Thus, group participation in joint, class, and collective actions regarding conditions of employment is an essential method of workplace organization and "at the core of what Congress intended to protect by adopting the broad language of section 7." The Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), does not change this. There is no practical way workers can bring minimum wage, overtime and similar claims as individuals with these costs facing them unless they do so collectively.

XVI. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT FORECLOSES CONCERTED ACTIVITY IN THE FORM OF EXPRESSIVE ACTIVITY, BOYCOTTING AND PICKETING IN SUPPORT OF AN INDIVIDUAL OR GROUP CLAIM.

The ALJ did not address this issue.

The FUAP is invalid because it makes it clear that the employees are limited to the arbitration procedure to resolve disputes. It applies to all disputes, not just disputes that could be brought in a court or before any agency. "It will govern any existing and future disputes between you and the Company that relates in any way to your employment." (Tr. 59 ("to resolve all disputes over work issues quickly").) This would foreclose the employees from engaging in strikes or boycotting activity, expressive activity or other public pressure campaigns. This is a form of a yellow dog contract. Here, employees agree that they shall use only the arbitration procedure to resolve disputes with the employer, and thus they would be violating the arbitration procedure if they were to use another forum, such as a public protest or a strike. It prohibits all

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forms of concerted activity because it requires that employees use the arbitration procedure. Presumably, an employee who violates this rule would be subject to discipline just as he/she would be for violating any other employer rule. This is a fundamentally illegal waiver of the Section 7 right to engage in lawful economic activity including boycotting, picketing, striking, leafleting, bannering and other expressive activity.

The FUAP is an unlawfully imposed no-strike, no boycott, no bannering, and no leafleting ban. It is unlawful for this reason. It is the worst form of a yellow dog contract.

XVII. THE FUAP IS INVALID BECAUSE THE EMPLOYER DOESN'T KNOW WHAT IT COVERS, AND THEREFORE IT IS OVERBROAD; THE DECISION IN *LUTHERAN HERITAGE VILLAGE-LIVONIA* SHOULD BE OVERRULED.

The ALJ did not address this issue,

Mr. Tarlton, the President of the employer, has no idea what the FUAP covers. (Tr. 87-98.) If he doesn't know, nobody does. This admitted uncertainty means employees will be equally uncertain. This ambiguity should be construed against the employer. The Board has made it clear that, where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." (*Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 at *26 (2014).) The Board relied upon its prior decision in *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). Thus, since the FUAP is totally ambiguous because the President of the company cannot explain it, it should be construed against the company to prohibit all forms of concerted activity and thus is overbroad. Additionally, this case illustrates precisely why the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), should be overruled.

The Charging Party furthermore suggests that the Board should return to the rule established in *Lafayette Park Hotel***,** 326 NLRB 824 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine for evaluating when employer-maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). See also *Ark Las Vegas Rest. Corp.*,

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343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity. If an employer's action interferes with the Section 7 right of one employee, the conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that only if many, and probably a majority, would have their rights violated, does the conduct violate the Act. Such a rule should be discarded and thrown into the trash pile of discredited doctrines.

In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

(*Lutheran Heritage Village-Livonia*, 343 NLRB at 647.)

This doctrine has created confusion and uncertainty in the application of rules. Moreover, it is an illogical statement. If the "rule could be interpreted that way [to prohibit Section 7 activity]," the rule should be unlawful. We are not suggesting that if that "reading is unreasonable," it should violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,

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it should be unlawful. Here, this is heightened by the fact that, as illustrated above, the Employer's Chief Executive Officer cannot explain the scope of the FUAP. If he can't do so, no employee can easily construe it. In fact, we believe that in most cases, if you ask the president of the company to explain their corporate rules, they can't explain how they would apply in most common circumstances where Section 7 rights are at issue. This case incisively illustrates why *Lutheran Heritage Village-Livonia* should be overruled.

The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity against the employer. This has been the consistent application in many areas of law, including the Board's application of employer-created rules. After all, the employer has control over what it says, and it can implement language that is not vague or ambiguous. Only the employer benefits from chilling and restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil*, *supra*, where there is an ambiguity it would be construed against the Employer. This is inherently true of most employer rules, but quite clear in this case.

A worker is not at fault if the employer makes a statement that is ambiguous and could affect or chill Section 7 rights. The employer statement should be construed against the employer. Where there is any reasonable interpretation of the rule that could interfere with Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider discretion and more power. Such ambiguities necessarily coerce some employees.

This interpretation has become one by which the Board ignores the illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has turned the law on its head; where there is a reasonable interpretation that the rule does not affect Section 7 rights, which only a few employees may apply, it makes no difference that most or many of the employees would apply a reasonable interpretation that the rule prohibits Section 7 activity.

Put in other words, the burden should be on the drafter and maintainer of a rule to prove that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or

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limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7 activity, it would be unlawful.

This is further illustrated by the Board's recent decision in *Three D, LLC d/b/a Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the "term 'inappropriate' to be 'sufficiently imprecise' that employees would reasonably understand it to encompass 'discussion and interactions protected by Section 7.'" (Slip Opinion p. 7.) This is almost a formulation that where there is an ambiguity in a phrase or rule it should be construed against the drafter and enforcer of the rule, namely the employer. This contradicts to some degree the later statement that "many Board decisions [] have found a rule unlawful if employees would reasonably interpret it to prohibit protected activities." (Slip Opinion p. 8.) The word "would" should be replaced with the word "could." This would shift the burden to the employer to clarify its rules to eliminate interference with Section 7 rights.

Recently, the Board has also made it clear that where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." (*Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 at *19 (2014).) The Board relied upon its prior decision in *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). Here, there are patent ambiguities in the four disputed rules. The ambiguities were proven because the employer witnesses couldn't interpret or explain the rules. If the employer can't explain the rules or understand them, then the employees would necessarily not be able to know whether their activity would be permitted or prohibited by the rules. Thus, there is an ambiguity created by even the employer's witnesses, which must be construed in light of *Murphy Oil* against the drafter of the rules, namely the employer.[17] Under these circumstances, this is the perfect case in which to overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in which to overrule that doctrine because the employer couldn't explain the rules. If the employer can't explain the rules, no employee could be expected to understand what position or

[17] It is worth noting that these rules were adopted in 2002 and haven't been modified since then. Thus, the employer has made no effort to comply with current Board law.

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conduct is prohibited or permitted.

The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of employer rules to be created from the employer perspective rather than from the view of a worker. Where the worker could read any reasonable interpretation into the rule that would prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that some workers might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the rule would chill those activities. Where one employee understands the rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has been created.

We quote at length the dissent, and we will ask this Board to return to the view of the dissent:

> In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."
>
> Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies

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> Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").
>
> The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's assertedly pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather, for reasons explained below, we find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

(*Id.* at 650 (footnote omitted).)

In summary, *Lutheran Heritage-Livonia* should be overruled.

XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER EMPLOYEES UNDER THE ACT.

The ALJ failed to address this issue raised by the Charging Party.

The FUAP is also invalid because it applies only to the employer. It does not bind its owners, directors, officers, managers, employees, agents and parties affiliated with the employer and so on. Each of these persons could be an employer within the meaning of the Act. There is no mutuality here. None of them is bound by the arbitration agreement, which, at best, is only binding on the employee and employer. Yet, the employee is bound to arbitrate claims against those individuals where those claims arise out of wages, hours and working conditions to the extent they are the employer. There are many wage and hour statutes, including the Fair Labor Standards Act, the Fair Employment and Housing Act and provisions of the Labor Code, which

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can impose individual liability.[18] Thus, the FUAP prohibits Section 7 activity against parties who are not the employer and thus is overbroad and invalid.

XIX. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT IS MUTUAL AND RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM.

The ALJ failed to address this issue.

Employees have the right to band together to defend against the claims made by the Employer. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to do so where there are joint or related claims against several employees. The FUAP is unlawful for this reason.

The FUAP is also unlawful because it is mutual. The FUAP specifically encompasses claims by employees against the company as well as claims by the company against workers. This imposes a very heavy burden on employees who may be jointly the subject of a claim by the company against them. Under the FUAP, they could not jointly defend themselves but would have to defend themselves individually in separate actions. It is not difficult to imagine a circumstance where the employer may have claims against multiple employees, such as overpayments for wages. The employees are entitled to defend such claims jointly and concertedly.[19] The FUAP is facially invalid since it prohibits group action to defend against claims jointly.[20]

XX. THE FUAP IS UNLAWFUL BECAUSE AN EMPLOYEE COULD BE DISCIPLINED FOR VIOLATING THE FUAP BY BRINGING A GROUP CLAIM.

The ALJ did not address this issue.

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[18] In addition, this effort to limit claims against benefit plans is arguably prohibited by ERISA, 29 U.S.C. § 1140, since it interferes with the rights of employees to bring claims against benefit plans.

[19] The FUAP specifically prohibits consolidation. This would be useful procedure for employees to concertedly defend claims.

[20] For example, employees would have to hire lawyers who would cost more for individual representation.

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Presumably, any employee who violates a unilaterally imposed policy would be subject to discipline for violating that policy. That would be true of the unilaterally imposed FUAP. It is thus a violation of Section 8(a)(1) to maintain an unlawful policy for which employees may be disciplined.[21]

XXI. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES A CONFIDENTIALITY PROVISION.

The ALJ failed to address the confidentiality provision which is unlawful. The FUAP adopts the American Arbitration Association Employment rules. Those rules are available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362. The FUAP also states that those proceedings "are held privately." (See page 2 of FUAP.) The confidentiality provision at page 24 of the AAA rules is overbroad since an employee would have the right to disclose to other workers the proceedings, results, evidence etc. (See *MCPc, Inc.*, 360 NLRB No. 39 (2014).)[22] Other workers would have the right to attend and observe.

XXII. THE FUAP WAS IMPLEMENTED UNLAWFULLY BECAUSE IT WAS IMPLEMENTED IN RESPONSE TO THE COLLECTIVE ACTIVITY OF THE MUNOZ LITIGATION.

The ALJ found that the FUAP was unlawfully implemented. We support the ALJ's decision. As described above, the FUAP was implemented in direct response to the collective law suit. The FUAP concedes it was newly implemented since it states, "Tarlton & Son Inc. … has adopted and implemented a *new* arbitration policy." (emphasis supplied) The FUAP applies to "any existing and all future disputes between you and the Company that relates in any way to your employment." It thus attempts to apply to the preexisting less than a month prior claims made in the Munoz litigation.

An issue which has not been addressed by the Board with respect to the application of these group waivers is whether such a policy can be implemented in response to collective action.

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[21] Even if the employer would have the right to force arbitration of the claim once it was filed, it would be an independent violation to discipline for doing so.

[22] Because Mr. Tarlton cannot explain what the word "privately" means (Tr. 102-103), it must be construed against the employer and is thus overbroad. (See *Murphy Oil*, *supra*.)

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1001 Marina Village Parkway, Suite 200
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The Board has repeatedly held in cases that, where the employer implements a facially neutral policy in response to protected concerted activity, even if the policy does not violate the Act on its face, the implementation is invalid. (See *Jordan Marsh Stores*, 317 NLRB 460, 462 (1995); *Auto. Plastic Techs.*, 313 NLRB 462 (1993); *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989); *Lincoln Ctr.*, 340 NLRB 1100, 1110 (2003); *N. Hills Office Servs.*, 346 NLRB 1099, 1113 (2006) and *Jensen Enters.*, 339 NLRB 877 (2003).) The violations in these cases do not depend upon the lawfulness of the implemented rule.

Indeed, an employer can have in place a lawful "no solicitation" or "no distribution" rule or other policies or rules. The problem, as pointed out in this case, is that such a lawful rule or policy cannot be implemented in response to protected concerted activity or union activity. Even where an employer already has such a facially-lawful policy in place that it has not enforced, it likewise cannot then begin enforcing it in response to protected concerted activity or union activity. These cases govern. Here, even if the Board or a court were to find that the policy is not invalid, it was implemented in response to concerted activity. It was plainly intended to interfere with the collective action of the lawsuit and future collective actions.[23]

For these reasons, the ALJ's decision that the FUAP was unlawfully implemented in response to the collective action of the lawsuit should be sustained.

XXIII. THE FACT THAT CARPENTERS UNION DID NOT OBJECT TO THE IMPLEMENTATION OF THE FUAP DOES NOT AFFECT THE OUTCOME.

The ALJ found that the Carpenters Union did not waive its right to bargain over the implement of the FUAP. The ALJ, however, failed to address directly the question of whether the Union could ever waive the right of employees and bring collective or class representative actions. The only defense that Respondent appears to offer (other than the question of whether the Federal Arbitration Act applies) is that an agent of the Carpenters Union agreed to the

[23] The ALJ incorrectly foreclosed the testimony about the waiver the employee signed to the Munoz litigation. This was part of the unlawful implementation of the FUAP. As a remedy, the waivers must be rescinded. (See Charging Party Exh. 1, rejected, Tr. 192-202.)

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(510) 337-1001

implementation of the FUAP. Although we do not believe that the record supports that claim, it makes no difference.

At best, what the record shows is that Mr. Canale was advised of the FUAP and said he did not object to the implementation of the FUAP. (Tr.142.) That is not an agreement to the policy. If it occurred, it was, at best, a waiver by the Union to the implementation of the policy. Those are two fundamentally different propositions.

The Supreme Court held in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), that "a union negotiated waiver of employees' statutory right to a judicial forum" for the resolution of federal anti-discrimination claims is unenforceable unless it is "clear and unmistakable." (*Id.* at 80.) In *Wright*, the Court set a high standard for determining when a federal discrimination claim is covered by a CBA's arbitration clause. The court held that "any CBA requirement to arbitrate it must be *particularly clear*." (*Wright*, 525 U.S. at 79, emphasis added.) Waiver of the right to pursue the claim in court must be "clear and unmistakable." (*Id.* at 80.) The right to a judicial forum is "of sufficient importance to be protected against less-than-explicit union waiver in a CBA." (*Ibid.*) General language in a CBA providing for arbitration of "[m]atters in dispute" did not meet this standard. (*Ibid.*) Since the Supreme Court decided *Wright*, courts have interpreted its holding to apply to arbitrability of other statutory claims, state and federal, including California wage and hour claims. (See, e.g., *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) ("*Wright* was a discrimination case, but we can assume that its holding applies to other statutory rights."), citing *O'Brien v. Town of Agawam*, 350 F.3d 279, 284-286 (1st Cir. 2003); *E. Assoc. Coal Corp. v. Massey*, 373 F.3d 530 (4th Cir. 2004) (applying *Wright* to state statutory claims); *Martinez v. J. Fletcher Creamer & Son, Inc.*, 2010 U.S. Dist. LEXIS 93448, *8-*10 (C.D. Cal. 2010) (holding *Wright* standard applicable to California wage and hour claims, including meal period claims).) The Supreme Court settled this question that the Union may not waive the right of the employees to bring civil actions unless that waiver is clear and unmistakable in the collective bargaining agreement. (See *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009).)

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Here, the verbal conversation with Mr. Canale did not establish such a "clear and unmistakable" agreement by the Carpenters Union to arbitrate all claims.[24]

In addition, the Board must find the Union could not, as a matter of law, waive the employees' rights in this regard. (See XXIV below.)

As noted during the hearing, some employees are not represented, even by the Carpenters Union. There are office employees (Tr. 27), shop employees (Tr. 51), unrepresented painters (Tr. 34) and certain crafts where their representation is unclear. In any case, the Carpenters Union cannot waive their rights. The FUAP expressly excludes only "claims that are subject to the grievance and arbitration provisions of any collective bargaining agreement." The ALJ noted this in her decision, and the Board should affirm in this regard.

XXIV. THE RIGHT TO BRING A COLLECTIVE OR CLASS ACTION MAY NOT BE WAIVED BY A UNION OR COLLECTIVE BARGAINING AGREEMENT; THE BOARD MUST DECIDE WHETHER A COLLECTIVE BARGAINING AGREEMENT IS GOVERNED BY THE FAA.

A union may waive certain Section 7 rights of the employees it represents—for example, the right to strike—in exchange for concessions from the employer. (See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).) However, such cases traditionally involve collectively bargained agreements to forego union related Section 7 activities, such as waivers of the right to strike or boycott. However, a union can waive employees' substantive rights under the Act unrelated to union activities, including such fundamental rights as the right to engage in protected concerted activities for mutual benefit and protection or engage in collective legal action. (Cf. *NLRB v Magnavox*, 415 U.S. 322 (1974).)

The Board rejected this in *Murphy Oil*, *supra*, relying on 29 U.S.C. § 160(a).

> The right to engage in concerted legal activity is plainly authorized by the broad language of Section 7, as it has been authoritatively construed by the Supreme Court in *Eastex*, supra, as part of the protected "resort to administrative judicial forums." And Section 10(a) of the Act, as pointed out, provides that the Board's authority

[24] Any such claim would be inconsistent with the terms of the collective bargaining agreement. (Respondent Exhibit ("RX") 1, p. 19-20. The same provision does not, however, appear in RX 2.)

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(510) 337-1001

> "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." An arbitration agreement like the one here, even if it did not run afoul of the FAA's savings clause, would seem to be precisely the sort of means of adjustment ...established by agreement that *cannot* affect the Board's enforcement of Section 7.

(361 NLRB No. 72, slip. op. at p. 12 (emphasis in the original, internal citations omitted).)

The Board addressed a similar claim in a recent case involving a challenge to a union-negotiated policy prohibiting employee participation in the Employer's internal politics or lobbying on personnel matters, wherein the Board stated that "the fact that the Union negotiated this provision does not by itself make it lawful, because the provision would reasonably be read to restrict Section 7 rights that the Union had no statutory authority to waive." (*Am. Fed'n of Teachers N.M.*, 360 NLRB No. 59, slip op. at 4 n.2 (2014).)

The ALJ did not address the question of whether the collective bargaining agreements are covered by the FAA. This remains an open question.

The Supreme Court has, since 1982, applied the Federal Arbitration Act to cases arising out of the collective bargaining agreements. (See, i.e., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 n.10 (2009).)

Recently, the Supreme Court has applied the Federal Arbitration Act in *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U. S. 287 (2010), affirming in part and reversing in part *Granite Rock Co. v. Int'l Bhd. of Teamsters, Freight Const., Gen. Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO)*, 546 F.3d 1169 (9th Cir. 2008). In that case, the Ninth Circuit had applied the Federal Arbitration Act doctrine of severability to a contract claim under a collective bargaining agreement to find that a matter was arbitrable. (546 F.3d at 1176-77.) Thus, the Ninth Circuit's most recent ruling is to apply the Federal Arbitration Act to labor disputes arising under collective bargaining agreements. The Supreme Court granted certiorari and applied the same

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(510) 337-1001

severability doctrine but found that using that doctrine, the dispute was not arbitrable. (*Id*. at 299-303.) The Supreme Court found that notwithstanding the Federal Arbitration Act's presumption of arbitrability, the dispute was not arbitrable because it involved contract formation and thus rejected the severability doctrine's application. The decision does not reject the application of the FAA to a collective bargaining agreement but rather continues the practice of separately analyzing contract formation issues.

The Supreme Court once again, however, did not precisely resolve the question of what happens if there is a conflict:

> We, like the Court of Appeals, discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases. [Citation Omitted]. Indeed, the rule that arbitration is strictly a matter of consent—and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it—is the cornerstone of the framework the Court announced in the *Steelworkers Trilogy* for deciding arbitrability disputes in LMRA cases.

(*Id.* at 298 n.6.)

Granite Rock, like its predecessors, is authority for the proposition that the Federal Arbitration Act governs labor cases. This case thus may be subject to the Federal Arbitration Act where the there is a collective bargaining agreement.[25]

The Ninth Circuit assumes that the FAA applies. (*Matthews v. Nat'l Football League Mgmt. Council* 688 F.3d 1107, 1115 & n.7 (9th Cir. 2012), and *Granite Rock v Teamsters*, 546 F.3d 1169 (9th Cir. 2008) (applying FAA doctrine to the collective bargaining agreement), reversed on other grounds, *Granite Rock v. Teamsters*, 561 U.S. 287 (2010).)

The district courts have assumed that the FAA applies to collective bargaining

[25] Of course, the Federal Arbitration Act also applies in state court where arbitration agreements affecting commerce are involved. (*Preston v. Ferrer*, 552 U.S. 346 (2008).)

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agreements. (See *Serv. Employees Int'l Union, Local 1107 v. Sunrise Hosp. & Med. Ctr., LLC*, 2013 WL 5324897 at *7 (D. Nev. 2013); *Local Joint Executive Bd. v. Ramparts, Inc.*, 2013 WL 5437368 at *3 (D. Nev. 2013); *Sheedy Drayage Co. v. Teamsters Union Local No.* 2785, 2013 WL 791886 at *5 (N.D. Cal. 2013) (*Pyett* and *Circuit City* point to "a steady drift in jurisprudence towards recognizing the applicability of the FAA"); and *Int'l Longshore & Warehouse Union, Local 142 v. Grand Wailea Resort Hotel & Spa*, 2013 WL 4855267, at *19 (D. Haw, 2013).)

The Eleventh Circuit has taken a different position. (*JAX Transit Mgmt. Corp. v. Amalgamated Transit Union Local Div. No. 1197,*, 2013 WL 4080030 (M.D. Fla. 2013) (FAA applies to statute of limitations, 11th Circuit has not resolved issue); *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Smurfit-Stone Container Corp.*, 479 F. App'x. 250, 253 (11th Cir. 2012); *United Gov't Sec. Officers of Am., Int'l Union v. CDA Inc.*, 2011 WL 5190785, at *1 (M.D. Ala. 2011).)

The Supreme Court, however, long ago rejected the characterization that collective bargaining agreements are employment agreements. Justice Frankfurter wrote:

> Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an *335 accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade

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(510) 337-1001

> agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.[1]

(*J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334-35 (1944).)

That statement still governs. The Board must resolve this issue at least as those employees governed by the terms of the collective bargaining agreements.

XXV. THE IMPLEMENTATION OF THE FUAP AS TO THE NON-REPRESENTED EMPLOYEES VIOLATES THE ACT.

Here, the FUAP was implanted differently as to the represented employees. Those abused workers who are unrepresented were forced to agree to a broader FUAP. This discriminates against them at least on the basis of their right to refrain from concerted activity. The discriminatory application of the FUAP violates section 8(a)(1) and (3).

XXVI. REMEDY

The ALJ rejected a number of remedies suggested by the Charging Party. The waivers should all be rescinded since they were achieved as part of the unlawful arbitration waivers. (Charging Party Exh. 1, rejected, Tr. 192-202.)

The employer should be required to post permanently the Board's ill-fated employee rights notice. The Courts that invalidated the rule noted that such a notice could be part of a remedy. It is time for the Board to impose the requirement for a lengthy posting as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. Any shorter period than 60 days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Board's notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
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(510) 337-1001

Tarlton's conduct through its consultant lawyers falls within the provision of 29 U.S.C. § 433(b)(1). The Board should report this conduct to the Department of Labor to ensure the filing by Tarlton of its LM 10 report and by Hill, Farrer and Burrill of its LM 20 and 21 reports as the persuader who was paid money to "persuade employees to exercise or not to exercise … their right to organize."

An appropriate explanation by way of notice reading should be required. That notice reading should require that a Board agent read the notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a notice without explanation is inadequate. The employer should not be present.

Tarlton should not be allowed to implement any such policy until after the Munoz litigation is finally concluded.

The ALJ erroneously gave Tarlton a free pass. She allows the Employer to implement a new FUAP. The Board does not possess that power. A new FUAP can only occur after there has been a complete remedy in the violations found in this case. In other words, the Employer may not implement any new policy until after it has completely remedied this case by rescinding all the unlawful policies, posting an appropriate notice allowing employees to take appropriate legal action without the implementation of any purported forced arbitration wavier.

The notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally implemented a Mutual Arbitration Procedure in response to collective action engaged by some former employees on behalf of the employees of Tarlton. We have agreed to rescind that unlawful policy. Additionally, we have been found to have implemented a policy that violated federal law. We have agreed to rescind that policy.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice.

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A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The ALJ recommended as a remedy that the notice be mailed to employees. The Board's decision should also be mailed at the same time. The notice does not explain what occurred and only through a receipt of the Board's decision can the employees know what occurred.

The employees should be allowed work time to read the Board's Decision and Notice.

The Board should direct that the General Counsel buy enough copies of Robert Gorman and Matthew Finkin "Labor Law Analysis and Advocacy" (JURIS 2013) to distribute to all the Administrative Law Judges and staff of the Board and the General Counsel to avoid the fundamental errors made by the ALJ.

XXVII. CONCLUSION

For the reasons suggested in this brief, these Exceptions should be granted. The Board should address the issue which the ALJ totally ignored. Additionally, the Board should address the other issues which she erroneously ruled.

Forcefully Submitted and Organize:

Dated: March 10, 2015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD

Attorneys for Charging Party

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WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

CERTIFICATE OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 10, 2015, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. James A. Bowles, Esq.
Mr. Richard S. Zuniga, Esq.
Hill, Farrer & Burrill, LLP
300 South Grand Avenue, 37th Floor
Los Angeles, CA 90071
(213) 624-4840 (fax)
JBOWLES@HILLFARRER.COM
rzuniga@ hillfarrer.com

Ms. Amy Berbower
National Labor Relations Board, Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5211
(510) 637-3315 Fax
Amy.berbower@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 10, 2015, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001